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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933.

No. 463

HANS ELLIOT And UNITED STATES FIDELITY AND GUARANTY COMPANY,

Petitioners,

versus

THOMAS R. LOMBARD,

Respondent.

BRIEF OF HANS ELLIOT And UNITED STATES FIDELITY AND GUARANTY COMPANY, PETITIONERS AND APPELLANTS.

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Opinions Below.

1. Opinion of District Court of United States for the Canal Zone—*not reported.* (R. 85). (This Brief, p. 4).

2. Opinion of United States Circuit Court of Appeals, Fifth Circuit, reported at *66 Fed. (2) 662.* (R. 484).

I.

Jurisdiction.

(a) The opinion of the United States Circuit Court of Appeals for the Fifth Circuit, to be here reviewed, was rendered: August 4th, 1933. (R. 484).

The decree, dismissing the appeal, was rendered on August 4th, 1933 (R. 491).

(b) The claims advanced below by petitioners, appellants below, and the rulings made, were:

(1) That a surety on a release bond in an admiralty proceeding *in rem* is not a necessary party to an appeal by the claimant, and no summons nor severance is required.

The Circuit Court of Appeals, Fifth Circuit, held *contra* (opinion R. at page 487).

(2) That a surety on a release bond in an admiralty proceeding *in rem*, has the right, by motion (R. 480), to voluntarily join in an appeal, waiving issuance and service of citation, even after the time for appealing has expired.

The Circuit Court of Appeals, Fifth Circuit, held *contra* (opinion R. at page 487).

(3) That the judgment of the District Court (R. 98) was provisional and contingent, not joint nor unconditional, as to the surety on the admiralty release bond in this *in rem* proceeding, and, hence, the surety was not a necessary party to the appeal.

The Circuit Court of Appeals, Fifth Circuit, held *contra* (opinion R. at page 487).

(c) The statutory provision under which jurisdiction is invoked is *Sec. 240 of Judicial Code*, as amended, *(28 U. S. C. A. 347)*, (Appendix I).

(d) Under the above law we invoke the jurisdiction of this Court on the ground that it is of great public importance to have the highest authority resolve the conflict now existing as to the necessity of sureties upon admiralty stipulations for the release of vessels seized under

process *in rem* being made parties to an appeal from the District Courts. It was held in this case, by the United States Circuit Court of Appeals for the Fifth Circuit, that such sureties are necessary parties to the appeal (R. 487); which is contrary to decisions rendered on the same questions by the Circuit Courts of Appeal of the:

2nd Circuit—*"The Lydia", 1 Fed. (2) 18.*
2nd Circuit—*"The Buckhannon", 299 Fed. 519.*
2nd Circuit—*"The Cartona", 297 Fed. 827.*
2nd Circuit—*"The William Jamison", 67 Fed. (2) 290.*
4th Circuit—*"The Glide", 72 Fed. 202.*
6th Circuit—*"The New York", 104 Fed. 564.*
9th Circuit—*Perrian v. Pacific Co., 133 Fed. 142.*

The 1st, 3rd, 7th, 8th and 10th Circuits apparently have not passed upon this issue.

II.

Statement of the Case.

1. Thomas R. Lombard, as owner of Sand Barge No. 4584, filed a libel *in rem* and *personam* in the United States District Court for the District of the Canal Zone on the 9th day of August, 1930, against the Motorship *"Real"* and Hans Elliot, in a cause civil and maritime for damages for a collision in the waters of the Canal Zone on the 31st day of July, 1930 (R. 3).

2. On the 13th day of August, 1930, Hans Elliot claimed the said Motorship *"Real"* (R. 19) and thereupon entered into a stipulation with the libelant for the release of said Motorship *"Real"* (R. 19).

3. Pursuant to such stipulation, Hans Elliot, your petitioner, executed a "Release Bond" in the sum of $10,000, whereon the United States Fidelity and Guaranty Company signed as surety (R. 20).

4. Trial of the matter was had on the 24th day of July, 1931, the Honorable James J. Lenihan, United States District Judge for the District of the Canal Zone, presiding (R. 62).

5. On the 13th day of August, 1932, Judge Lenihan rendered his opinion and on the 27th day of August, 1932, entered a decree in favor of the libelant, Thomas R. Lombard, and against the claimant, Hans Elliot, awarding the libelant damages in the sum of $6,321.29 (R. 97). By such decree it was:

> *(a)* "Ordered, adjudged and decreed, that the libelant herein do have and recover from the respondent herein the sum of $6,321.29, with interest thereon at the rate of 6% per annum from the 31st day of July, 1930, together with the libelant's costs taxed in the sum of $117.20, with interest thereon until paid;",
>
> *(b)* "Ordered, adjudged and decreed, that unless this decree be satisfied or an appeal taken within ten days after service of a copy of this decree with notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and the United States Fidelity and Guaranty Co., his stipulators for costs and value, their goods, chattels and lands to satisfy this decree;"
>
> *(c)* "Ordered, adjudged and decreed that the cross-libel herein be dismissed at cross-libelant's costs" (R. 98).

6. On the 10th of September, 1932, and within ten days from service of notice of the entry of the said decree, Hans Elliot, respondent, filed a petition for appeal to the United States Circuit Court of Appeals for the Fifth Circuit, together with his assignment of errors (R. 99), which petition was allowed (R. 101).

7. The appeal to the United States Circuit Court of Appeals for the Fifth Circuit having been perfected, the appellee, Thomas R. Lombard, did, on the 19th day of April, 1933, file in the United States Circuit Court of Appeals for the Fifth Circuit a "Motion to Dismiss the Appeal" on the grounds that the United States Fidelity and Guaranty Company, surety upon claimant's release bond, had not been made a party to the appeal or that a severance had not been made (R. 477).

8. Thereafter, on April 22, 1933, the United States Fidelity and Guaranty Company, the surety on the release bond above mentioned, voluntarily appeared in the United States Circuit Court of Appeals for the Fifth Circuit and moved for leave to join with the appellant, Hans Elliot, in prosecuting the appeal, expressly waiving issuance and service of citation (R. 480). At the same time, Hans Elliot moved for leave to amend his appeal to include the surety company as a party appellant (R. 478).

9. On the 4th day of August, 1933, the said United States Circuit Court of Appeals for the Fifth Circuit entered a decree dismissing the appeal on the grounds that the failure of the surety on release bond to be made a party

to the appeal was fatal and required dismissal (R. 491); (opinion R. 484). From such holding Judge Samuel H. Sibley dissented and rendered a separate opinion (R. 488).

10. As additional grounds the Circuit Court of Appeals, Fifth Circuit, held: that in this admiralty appeal the surety upon the bond for release of the vessel seized by process *in rem*, who had not been made party to the appeal, cannot, after the time has expired for perfecting the appeal, be made party of record, even by appearing voluntarily, as the judgment entered by the District Court in the matter at bar was, from the time of its rendition, not provisional, but joint and final against the surety equally as against Hans Elliot, the principal.

11. Thereafter this Honorable Court on the petition of Hans Elliot and the United States Fidelity and Guaranty Company, appellants below, granted a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, for which the reasons relied on were:

> *(A)* The decision of said Circuit Court of Appeals, Fifth Circuit, as to the necessity of sureties upon an admiralty stipulation being made parties to an appeal is in conflict with the decision of the Circuit Courts of Appeal for the Second, Fourth, Sixth and Ninth Circuits, on the same matter, in the cases of *The Lydia, 1 Fed. (2) 18* (C. C. A. 2nd Cir.); *The Buckhannon, 299 Fed. 519* (C. C. A. 2nd Cir.); *The Cartona, 297 Fed. 827* (C. C. A. 2nd Cir.); *The William Jamison, 67 Fed. (2) 290* (C. C. A. 2nd Cir.); *The Glide, 72 Fed. 200* (C. C. A. 4th Cir.); *The New York, 104 Fed. 561* (C. C. A. 6th Cir.); and *Perrian v. Pacific Coast Company,*

133 Fed. 140 (C. C. A. 9th Cir.), and is a decision of an important question of general law.

(B) The decision of the Circuit Court of Appeals, Fifth Circuit, denying the right of a surety to join voluntarily in an appeal prior to hearing in such court is in conflict with the weight of authority.

(C) The decision of the Circuit Court of Appeals, Fifth Circuit, holding that the decree entered by the District Court was as joint and effective against the surety at the date of its entry, as it was against the claimant is an erroneous decision of an important question of general law.

Consequently this case is now presented to this Honorable Court for its review of the issues propounded in the petition for the writ of certiorari.

III.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the United States Fidelity and Guaranty Company was a necessary party to the appeal. (R. 486-487).

2. The Circuit Court of Appeals erred in refusing to allow the United States Fidelity and Guaranty Company to be made a party appellant upon its voluntary appearance in the Appellate Court, waiving the issuance and service of citation. (R. 487).

3. The Circuit Court of Appeals erred in holding that the decree entered by the District Court was joint and effective against the surety as of the date of its entry as it was against the appellant, Hans Elliot. (R. 487).

IV.

ARGUMENT.

Summary of Argument.

Point A. We propose in Point A to discuss the conflicts existing between other circuits and authorities and the Fifth Circuit as to the necessity of sureties upon an admiralty release bond being made parties to an appeal.

Point B. We propose in Point B to discuss the right of a surety to join voluntarily in an appeal even after the time for perfecting an appeal has expired.

Point C. We propose in Point C to discuss the effect of a decree such as was entered by the District Court in the instant matter, with special emphasis on its effect upon a surety prior to the time when by its terms such decree operates against a surety.

Point A.

Conflicts.—The Fifth Circuit Court of Appeals in the instant matter dismissed the appeal of Hans Elliot for the reason that the surety, United States Fidelity and Guaranty Company, was not made a party to the appeal, was not asked to join in the appeal, and there had been no summons or severance.

The court itself, speaking of the motion to dismiss, says:

> "On questions presented by the above motions the decisions are not harmonious, particularly with

regard to admiralty stipulations for the release of vessels:" (R. 482).486

Benedict on Admiralty, Vol. 1, 5th ed., at *page 642*, states:

> "All parties against whom a decree is rendered should join in the appeal, or the record should show that those who have not joined have had notice of the taking of the appeal and have either refused or neglected to joint. But sureties on a stipulation are not parties and need not join."

Cyclopedia of Federal Procedure, Section 2745, at *page 159 of Vol. 6*, states:

> "It being settled law that an admiralty appeal brings up the whole case *de novo*, vacating thereby the decree below, it is unnecessary that any but one party or claimant take an appeal, which operates for all, so that non-appearing parties are no longer bound by the decree below."

Vol. 1, Corpus Juris, 1346, Section 298, states:

> "Sureties appearing on the record may appeal, but they are not necessary parties to an appeal by a party to the record, unless some extraneous question arises involving their obligation on their bond or stipulation."

The Fifth Circuit stands alone in its ruling that the sureties upon a stipulation for the release of a vessel are necessary parties to an appeal.

> "Sureties on a stipulation are not parties to the record. When a vessel is attached by proceedings in rem, the owner, or some one on his behalf, filed his claim to her, and thence forward becomes a party to the record, and conducts and controls the

defense. * * * But sureties in the stipulation do not become parties." *The Glide, 72 Fed. 202* (C. C. A. 4).

"Such a bond is not a mere personal security given to the plaintiff, but security given to the court. It is a pledge or substitute for the property proceeded against, and the sureties are not parties to the suit, or entitled to interfere in any way with the management of the suit. Unless some extraneous question arises involving the scope or obligation of the sureties in such bond, they are not necessary parties to an appeal taken by any of the parties to the record." *The New York, 104 Fed. 564* (C. C. A. 6).

"Sureties to such a stipulation are not parties to the controversy. The claimant alone conducts and controls the defense." *Perrian v. Pacific Coast Co., 133 Fed. 142* (C. C. A. 9).

"The appearance of the stipulator as an intervenor cannot be recognized. The only difference in this regard between this case and that of *Paulsen v. The Cartona, 297 Fed. 827* (C. C. A. 2), is that the stipulator himself was permitted to intervene in this cause, instead of those who had given cross-security to the stipulator. It is just as true in this instance as it was in that of the case cited that the stipulator had no interest in the *res*, and therefore cannot be permitted to appear as an intervenor." *The Buckhannon, 299 Fed. 519*, at *p. 520* (C. C. A. 2); *The Lydia, 1 Fed. (2) 18* (C. C. A. 2).

In "*The William A. Jamison*," *67 Fed. (2) 290* (C. C. A. 2) the Court said at *page 291:*

"But, in admiralty causes, while recognizing the authority of the rule (Estis v. Trabue, supra), it has been held that stipulators for value were not necessary parties on appeal, even though severance

was not obtained. The Lydia, 1 F. (2d) 18 (C. C. A. 2); Perriam v. Pacific Coast Co., 133 F. 140 (C. C. A. 9); The New York, 104 F. 561 (C. C. A. 6); The Glide, 72 F. 200 (C. C. A. 4).

These cases recognize the admiralty practice that a stipulator for value has no right to conduct the claimant's case and merely substitutes a bond as a *res* in place of the vessel released, as required by Revised Statutes, § 941 (28 USCA § 754)."

The opinion of the Circuit Court of Appeals, Fifth Circuit, in this case indicates its belief that it was constrained to so hold by *Hartford v. Bunn, 285 U. S. 169, 52 S. C. 354, 76 L. Ed. 685.* We submit that this Court did not, in the *Hartford* case, hold that a surety is **always** a necessary party to an appeal from a judgment that would be final but for the appeal; the holding was expressly restricted to those occasions where the judgment involved is joint on its face; it cited the following cases where the judgments **were joint**:

Norfolk & S. Trp. Co. v. Virginia, 225 U. S. 264, 32 S. Ct. 828, 56 L. Ed. 1082; Masterson v. Herndon, 10 Wall. 416, 19 L. Ed. 953; Estis v. Trabue, 128 U. S. 225, 9 S. Ct. 58, 32 L. Ed. 437; Mason v. U. S., 136 U. S. 581, 10 S. Ct. 1062, 34 L. Ed. 545; Hardee v. Wilson, 146 U. S. 179, 13 S. Ct. 39, 36 L. Ed. 933.

For rulings of this Court subsequent to *Hartford v. Bunn, supra,* expressly recognizing that restriction of the applicability of that decision to joint judgments, see memorandum cases: *Capital National Bank v. Sup. Hinds Cty., 286 U. S. 550, 52 S. Ct. 504, 76 L. Ed. 1286; Fidelity Union*

Cas. Co. v. Hanson, 287 U. S. 599, 53 S. Ct. 12, 77 L. Ed. 522; Wagner Tug Boat Co. v. Meagher, 287 U. S. 657, 53 S. Ct. 120, 77 L. Ed. 567; Missouri State Life Ins. Co. v. Johnson, 288 U. S. 609, 53 S. Ct. 404, 77 L. Ed. 984.

Therefore, where the judgment is contingent, not joint, the rule in *Hartford v. Bunn* is necessarily inapplicable. *"The William A. Jamison", 67 Fed. (2d) 290, supra* (C. C. A. 2).

In the case of *The Lydia, 1 Fed. (2) 18, p. 21* (C. C. A. 2), where a judgment in form similar to the one at bar was entered, the court denied the right of the stipulator to become a party by appealing from the decree below.

Point B.

The Appellate Court refused to allow the United States Fidelity and Guaranty Company to be made a party to the appeal upon its voluntary appearance before the hearing, expressly waiving issuance and service of citation, and denied the motion of Hans Elliot to amend his appeal so as to make the United States Fidelity and Guaranty Company a party to the appeal.

Such an amendment was allowed by this Honorable Court, without opinion, in the cases of *Inland & Seaboard Coasting Co. v. Tolson, 136 U. S. 572, 34 L. Ed. 539;* also in *Knickerbocker Life Insurance Company v. Pendleton, 112 U. S. 696,* at *page 710, 28 L. Ed. 866.*

The C. C. A., Fourth Circuit, has also held:

"It would appear to be settled that this court, under the provisions of Sec. 1005, Rev. St. U. S.,

28 U. S. C. A. 873 (Appendix II) above mentioned, has the power to allow an amendment such as the one moved for in this case, although thereby an additional party is inserted in the writ of error and the citation, and although at the time the amendment is allowed the period within which the writ of error should have been sued out from the original judgment has elapsed." *Gilbert v. Hopkins* (C. C. A. 4), *198 Fed. 849*, at *page 850*.

A similar motion to amend by adding a co-defendant in error was granted and motion to dismiss denied without discussion in *Rininger v. Puget Sound Electric Ry.* (C. C. A. 9), *220 Fed. 419*.

Similar motions were granted by the Circuit Court of Appeals for the Fifth Circuit in *The Seguranca, 250 Fed. 19*, and *The Mary B. Curtis, 250 Fed. 9*, and by the Circuit Court of Appeals for the Fourth Circuit in *Browning v. Boswell, 209 Fed. 788* (C. C. A. 4), in which case the court said, after holding it had discretionary power to make the order for amendment, at *page 791:*

> "It is equally clear that in the present instance the discretion ought to be exercised and the motion granted. There has been no lack of diligence, but at most a misapprehension by counsel as to a question of practice, and the motion is made to meet the objection urged by the appellees that the appeal can not be prosecuted without citation of the creditors. The appellees will not be delayed or otherwise prejudiced and the bringing in of the creditors as parties to the appeal by issuing the citation to them will have the good effect of entirely eliminating from the record a serious technical question, and leaving the case to be decided on its merits."

Point C.

The Circuit Court held the judgment rendered in the District Court to be joint.

As said by Judge Samuel H. Sibley in his dissenting opinion in this case (R. ~~494-495~~ 489-490):

> "To me this decree seems on its face **evidently not joint,** but that the only effective parts of it are against Elliot alone, the respondent below. There are three distinct judgments in separate paragraphs. The first is: 'Ordered, adjudged and decreed that the libellant do have and recover of the respondent' certain sums. This is the decree in the original cause. The surety, United States Fidelity & Guaranty Company, is not mentioned in it. The second is: 'It is further ordered, adjudged and decreed that unless this decree be satisfied or an appeal taken within ten days after service of a notice of entry upon the respondent or his proctor, execution issue against Hans Elliot, respondent, and United States Fidelity and Guaranty Company, his stipulators * * * to satisfy this decree.' This is the summary judgment on the stipulation which by the provision of 28 U. S. C. A., Sec. 754, 'may be recovered at the time of rendering the decree in the original cause.' It is not the same thing as the decree in the original cause, though often included in it, but is an additional judgment on the stipulation, gotten against the parties to it without additional proceedings therefor. The third judgment is: 'Ordered, adjudged and decreed that the cross-bill be dismissed.' United States Fidelity & Guaranty Company is a party to the second of these judgments only, and that judgment is but provisional. For it to be made operative there must be proof of service of a notice on the respondent or his proctors of the rendition of the first judgment and proof of the lapse of ten days thereafter without payment or

appeal, consideration of which would perhaps require further judicial action. But in fact there was an appeal within ten days, so that by its own terms this judgment never became operative. There was nothing for the United States Fidelity & Guaranty Company to appeal from. It was not, however, discharged from its stipulation, for if its condition be looked to it shows an obligation to 'pay the money awarded by the final decree rendered by the court of the appellate court if any appeal intervenes.' A summary judgment can be entered on the stipulation so soon as a truly final decree in the case is had, although rendered on a mandate from this court. A joint decree might have been made on the trial below, but it was not."

"The condition of the appeal bond is that the appellants shall pay the damages and costs which shall be awarded against them by this court, as appellants, if they shall fail to make their appeal good. The appellants are not under obligation to pay the sum awarded against them by the decree until the time when execution can issue on the decree, which is not until the expiration of ten days after the rendering of the decree. The obligations of the sureties being an obligation only that the appellants shall pay when obliged to pay, cannot be enforced against them in any manner, even to the extent of entry of judgment against them, until the obligations of the appellants to pay comes into force; and such obligation of the appellants does not, in a case like the present, where the appeal may be a supersedeas, come into force until the expiration of ten days after the rendering of the decree." The New Orleans, 18 Fed. Cas. No. 10,181, 17 Blatchford 216.

In reaching a conclusion whether or not the judgment now under consideration is provisional or joint, this Court cannot, as it said in *Hartford v. Bunn*, *supra*, "un-

dertake to explore the record"; the face of the judgment must afford the sole indication of its effect. The majority opinion of the Circuit Court of Appeals, Fifth Circuit, while seemingly relying on *Hartford v. Bunn, supra*, does not deny that the judgment of the District Court herein was contingent upon its face, but reasons (R. 487) "whether a judgment is joint depends on substance rather than form" and then proceeds to *explore the record*—which method of mental approach was expressly disapproved in *Hartford v. Bunn, supra.*

Hartford v. Bunn is distinguishable on two additional grounds: The action there was at law; and the appellant and surety had previously obtained the full benefit of an appeal to the Supreme Court of Mississippi, in which Court the judgment (reviewed by this Court) was *joint in form and final as to both parties*; while the Court that dismissed the appeal here at issue was the appellate court of the first instance, and ***"the law favors appeals"***.

Since the application for the writ was filed in this Court our contentions that the judgment of the District Court is not joint and that *Hartford v. Bunn* is not controlling, was expressly upheld by the Circuit Court of Appeals for the Second Circuit in *"The William A. Jamison", 67 Fed. (2d) 290;* that case involved identical issues, for the judgment there reviewed was, for all practical purposes, identical in wording with the judgment now at issue. The Court said therein at *page 292:*

> "We need not say now whether we should look beyond the form of the judgment for here the obligation as the judgment records is joint and several, and this distinguishes the instant case from

the Hartford Co. case. It permits us to act in conformity with our rules and our previous decisions in holding that the stipulator is not a necessary party to the appeal in this admiralty cause and that he has no interest in the *res*. The Lydia, 1 F. (2d) 18 (C. C. A. 2); The Buckhannon, 299 F. 519 (C. C. A. 2).

The motion to dismiss is therefore denied."

Conclusion.

It is, therefore, respectfully submitted that the decision of the Circuit Court of Appeals for the Fifth Circuit should be reversed and this cause be remanded with instructions that the appeal be there reinstated for further proceedings not inconsistent with the rulings of this Court.

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APPENDIX I.

28 U. S. C. A. 347. (Judicial Code, Section 240, amended). Certiorari to circuit courts of appeals and Court of Appeals of District of Columbia; appeal or writ of error to Supreme Court from circuit courts of appeals in certain cases; other reviews not allowed. *(a)* In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal.

(b) Any case in a circuit court of appeals where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is against its validity, may, at the election of the party relying on such State statute, be taken to the Supreme Court for review on writ of error or appeal; but in that event a review on certiorari shall not be allowed at the instance of such party, and the review on such writ of error or appeal shall be restricted to an examination and decision of the Federal questions presented in the case.

(c) No judgment or decree of a circuit court of appeals or of the Court of Appeals of the District of Columbia shall be subject to review by the Supreme Court otherwise

than as provided in this section. (Mar. 3, 1891, c. 517, Section 6, 26 Stat. 828; Mar. 3, 1911, c. 231, Section 240, 36 Stat. 1157; Feb. 13, 1925, c. 229, Section 1, 43 Stat. 938).

APPENDIX II.

28 U. S. C. A. 873. Amendment of writ of error. The Supreme Court may, at any time, in its discretion and upon such terms as it may deem just, allow an amendment of a writ of error, when there is a mistake in the teste of the writ, or a seal to the writ is wanting, or when the writ is made returnable on a day other than the day of the commencement of the term next ensuing the issue of the writ, or when the statement of the title of the action or parties thereto in the writ is defective, if the defect can be remedied by reference to the accompanying record, and in all other particulars of form: Provided, The defect has not prejudiced, and the amendment will not injure, the defendant in error (R. S. Section 1005).